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IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.378/85

NOT RECOMMENDED

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BETWEEN HOYLE
Appellant

A N D POLICE
Respondent

Hearing: 17 December 1985

Counsel: P.R. Heath for Appellant
C.Q.M. Almao for Respondent

Judgment: 19 FEB 1986

JUDGMENT OF GALLEN J.

The appellant appeals against a conviction on a charge of theft. The background to the charge is as follows. Mrs Yvonne Kettle an elderly lady residing in Cambridge wished to have a waterbed erected at her home. The reason for this was to provide for her son who was seriously ill from cancer. The defendant is in business in Cambridge and in the course of his business, sells beds. Mrs Kettle approached him to perform the necessary work and although this was not something which he is normally engaged in, he was prepared to do so in this case. He quoted a price to Mrs Kettle of $85 which was accepted.

The learned District Court Judge found that the appellant arrived at Mrs Kettle's home in order to erect the waterbed, on 21 May 1985. The bed was to be erected in a room in which there was already a normal double bed base, mattress and headboard. These had to be taken down and removed before the waterbed could be erected. The appellant carried out the work and Mrs Kettle obtained the necessary funds which she already had available, from a room which was occupied by a boarder a Mr Margin. Mr Margin was there at the time, in bed, suffering from influenza.

The learned District Court Judge found that when the money was offered to the appellant, the appellant asked what was to happen to the bed which had been dismantled. He was informed that it was Mrs Kettle's intention that the bed be taken to a Cambridge auction mart and there be sold on her behalf. The learned District Court Judge found as a fact that the appellant offered to take the bed to the mart for Mrs Kettle. Mrs Kettle was apparently insistent that the bed was to be sold on her behalf and that the appellant was not authorised to sell it. The learned District Court Judge however, accepted that there was some room for mistake between the appellant and Mrs Kettle as to what was actually agreed and he accepted that the appellant thought he was entitled to dispose of the bed to the best value and deduct the $85 from the proceeds.

On the same day, the appellant negotiated a sale at the auction mart of the mattress and base for a sum of $120. He did not then sell the headboard because he considered that the price offered for it was too low and it was his intentinon to endeavour to sell the headboard elsewhere at a better price. The following day, Mrs Kettle discovered that the bed had not as she thought, been left at the auction mart for sale but had been sold by the appellant who had retained the headboard. Mrs Kettle discovered that the appellant had received the sum of $120 from the sale of the base and mattress and on her behalf, Mr Margin (Mrs Kettle's boarder) called to see the appellant. There was a dispute as to what was said and what occurred during that visit. The learned District Court Judge said:-

> "I am satisfied that Mr Margin's version is to be accepted. It certainly is the one I prefer and is therefore: Mr Margin went there; did not disclose he had been to the Auction mart; was not told by the Defendant that the bed and mattress had been sold at the Auction mart, and when asked by Mr Margin on behalf of Mrs Kettle how he had got on, the Defendant in fact offered to check up and made what was apparently a telephone call but what was a fictitious 'phone call to the mart and carried on a telephone conversation with nobody, in which the figure of $85.00 was mentioned."

The learned District Court Judge went on to hold that the appellant offered to pay Mrs Kettle $5 on the basis that the bed had been sold for $85. No mention was made of the headboard. Subsequently, on a date which the appellant says was 30 May, he went to Mrs Kettle and offered her $95 made up of the $120 received for the bed, mattress and base and $60 which he assessed as the value of the headboard, less the $85 erection fee for the waterbed. The learned District Court Judge referred in his decision to the fact that it was put to Mrs Kettle in cross-examination that the appellant had offered her $60 on a visit at some stage after she had made a complaint to the police.

The learned District Court Judge indicated that the real issue was whether in law the activities of the appellant amounted to theft. He then referred to the definition of theft and having done so, expressed his conclusion in the following words:-

> "Having regard to what I have accepted to be a fictitious telephone conversation put on for the benefit of Mr Margin, that in my view, totally does away with any possibility of colour of right. Such an action is a fairly clear indication that the Defendant intended to defraud Mrs Kettle. More particularly, when he made an offer of $5.00 over and above his fee for installing the waterbed, to Mr Margin, on Mrs Kettle's behalf; that, at a stage when he had already received $120.00 for the base and mattress and still had in his possession

> the headboard, worth, on his later assessment, $60.00. How much better it would have been for Mr Hoyle, the Defendant, to say to Mr Margin, "I sold the base and mattress for $120.00. I have not as yet sold the headboard. I owe, therefore, Mrs Kettle $35.00. Here is a cheque for her and when I sell the headboard, I will send her a cheque for that also", rather than to maintain the charade which you did maintain..
>
> While the Defendant, I think had justification for selling the mattress, he had no justification for converting the proceeds to his own account. I am satisfied he evinced such a sale by unlawfully endeavouring to carry out a false telephone conversation to induce in Mr Margin, that the bed was sold for such a sum. I am satisfied it was an intent to steal and further, it has been affirmatively established to the criminal standard of absence of colour of right, and he will be convicted."

From this, it is apparent that the learned District Court Judge regarded the matter effectively as one of conversion - conversion of the proceeds of sale. Counsel referred to the recent decision of the Court of Appeal in R. v. Williams (1985) 1 N.Z.L.R. 294 with the explanation of the meaning of the term "fraudulently" as explained in that case. He submitted and I agree, that the finding of the learned District Court Judge depended almost entirely on the acceptance of Mr Margin's version of what happened at the appellant's place of business and his finding that the alleged telephone

call was fictitious played a significant part. In the light of this, the appellant submitted that the decision of the learned District Court Judge in preferring the evidence of Mr Margin, was one unsupported by reasons. It was contended that following the decision of the Court of Appeal in R. v. Awatere (1982) 1 N.Z.L.R. 644 and R. v. McPherson (1982) 1 N.Z.L.R. 650, the decision could not stand because the decision of the learned District Court Judge on credibility was not supported by reasons for arriving at the conclusion to which he came.

The principle decision in R. v. Awatere does not impose an absolute obligation on Judges in such circumstances to give reasons for their conclusion, but it does put an emphasis on the desirability of such reasons being given and points out that in cases where an absence of such reasons could seriously affect the rights of an appellant on appeal, then it is unlikely that the decision would stand. In my view however in this case, the learned District Court Judge has given reasons for his conclusion. Although the passage on p.3 referring to the matters in dispute between Mr Margin and the appellant is in form a repetition of the evidence given by Mr Margin, a close scrutiny indicates that there is more to the finding than that. Not all the matters included were the subject of dispute either in the evidence given in chief by the appellant or in cross-examination of Mr Margin. The repetition by the learned District Court Judge of the evidence that Mr Margin was not told that the bed and mattress had been sold and

that a manifestly inadequate offer was made bearing in mind the sale which had already taken place were no doubt included by the learned District Court Judge as matters of significance, leading to the conclusion to which he came on credibility and this is I think confirmed by his repetition of these matters at the end of the decision.

Counsel contended in addition, that in any event, such a conclusion was against the weight of evidence. Reference was made to a number of matters in this regard but a particular emphasis was placed on the fact that the evidence of Mr Margin conflicted in material respects with the evidence given by Mr Johnson, the auction mart proprietor. Counsel contended that in those circumstances, the evidence of Mr Margin could hardly be relied upon and that a decision based on credibility as between Mr Margin and the appellant was therefore suspect. The particular point upon which most reliance was placed was that Mr Margin claimed to have spoken to Mr Johnson, but Mr Johnson in evidence indicated that he was not present when Mr Margin called. Whether this is so or not, it did not assume any particular importance at the hearing because Mr Margin was not cross-examined about it nor was Mr Johnson cross-examined in relation to this matter. That being so, I think it was open to the learned District Court Judge to regard the principal dispute as between Mrs Kettle and Mr Margin on the one hand and the appellant on the other. There

was evidence upon which conviction rested upon what he regarded as the conversion of the funds subsequent to the arrangements made with Mrs Kettle.

The learned District Court Judge was prepared to accept that the evidence did not establish the necessary intent with regard to the appellant's dealings with the bed and mattress. His finding related to the dealings with the proceeds. Nor could I find that the conviction was against the weight of evidence. The decision is pre-eminently one which had to be resolved on the basis of credibility and credibility could only be determined by observation of the witnesses and a careful consideration of the accounts which they gave as the trial proceeded. The learned District Court Judge was in the best position to deal with this and I do not think that his decision gives any indication that he approached any of the matters before him on a wrong basis.

The appeal will accordingly be dismissed.

RJ Gallen J

Solicitors for Appellant: Messrs Stace, Hammond and Company, Hamilton

Solicitor for Respondent: Crown Solicitor, Hamilton

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